United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7317

To be argued by
HARRY E. YOUTT

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

HENRY H. WELDON,
Defendant-Appellee.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

CHARLES B. WRIGHTSMAN and JAYNE WRIGHTSMAN,
Defendants-Appellees.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

—against—

METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE WELDON

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- against - :

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:
- -x
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:
- -x

On appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE WELDON

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendant-appellee Weldon is not satisfied with the Statement of Issues Presented for Review submitted by plaintiff-appellant (Plaintiff's Brief on Appeal, p.2), and accordingly,

pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure, submits that the issues presented for review on this appeal are as follows:

1. Whether the Court below properly ruled that this action for conversion of a painting confiscated allegedly from plaintiff's predecessors in the Soviet Union by the Soviet Government, and later sold to a private party at auction in Berlin in 1931, is barred by the Act-of-State Doctrine.

2. Whether the granting of summary judgment was properly founded upon the absence of a genuine issue of material fact as to whether the painting at issue was in fact confiscated by the Soviet government within the territory of the Soviet Union.

Whether, notwithstanding the Court's disposition with respect to the Act-of-State Doctrine, this action is barred as a matter of law, by the applicable Statute of Limitations, Section 214(3) of the New York Civil Practice Law and Rules.

STATEMENT OF THE CASE

Defendant Weldon is dissatisfied with the Statement of the Case presented by plaintiff (Plaintiff's Brief on Appeal,

p. 4), and accordingly, pursuant to Rule 28(b) of the Federal Rules of Appellate Procedure, submits the following statement.

NATURE OF THE CASE

This is an appeal from the order and judgment dated June 1, 1976 of the Hon. Dudley B. Bonsal below, granting summary judgment in favor of, inter alia, the defendant Weldon. Plaintiff's complaint, alleging conversion of a Van Dyck portrait and seeking the recovery of damages, was filed on February 6, 1974. Answer to the Complaint was served on December 23, 1974. And on February 19, 1975, prior to the taking of any depositions, defendant Weldon filed his motion for summary judgment, alleging, inter alia, that the action was barred by the Act-of-State Doctrine and the applicable statute of limitations.

The motion for summary judgment was argued on May 5, 1975 and taken under advisement by the Court below. Thereafter, by memorandum dated September 16, 1975, the Court requested further briefing by both plaintiff and defendant Weldon on the issues of the Act-of-State Doctrine and the Statute of Limitations. Pursuant thereto, additional briefs were filed with the Court by both parties on October 15, 1975.

On October 16, 1975, after the motion of defendant Weldon had been fully submitted and taken under advisement by the Court below, defendants Wrightsman, in a separate action commenced by plaintiff alleging conversion of another work of

art, served their motion for summary judgment, also based upon the Act-of-State Doctrine. This motion was argued on December 8, 1975.

On May 18, 1976, the Court below issued its Memorandum Opinion granting summary judgment in favor of both defendants upon the finding that both actions are barred by the Act-of-State Doctrine as a matter of law.

Plaintiff has appealed to this Court, and on July 2, 1976, the cases were consolidated for purposes of appeal.

FACTS

Plaintiff claims to be the heir of the Stroganoff-Scherbatoff family of Russia. He claims that certain works of art belonging to his family were illegally sold by a Soviet Agency in an auction in Berlin in 1931. One of the works sold was the portrait of Antoine Triest by Van Dyck. Defendant acquired the Van Dyck portrait in the 1960's. On December 21, 1973, plaintiff sent a purported written demand to defendant Weldon for return of the painting, which demand was refused. This action for damages in conversion followed.

Shortly after filing his answer to the complaint, defendant Weldon filed his motion for summary judgment. In it he contended that the evidence overwhelmingly established that the painting had never belonged to plaintiff's family and asserted the absence of a genuine issue of fact as to this matter. Alternatively, he

contended that as a matter of law, the Act-of-State Doctrine should bar the inquiry by our courts into the confiscatory acts of the Soviet Government with respect to the art collection of plaintiff's family in Russia.

The Court below granted defendant Weldon's motion for summary judgment in its memorandum opinion dated May 18, 1976, upon the Act-of-State ground, ruling that:

> The sale of the Stroganoff Collection was held by order of the Handelsvertretung and as such was carried out under the direction and with the consent of the Soviet Government. While the actual sale of the works of art occurred in Berlin, the property had been seized in Russia by the Soviet Government. (Memorandum Opinion p. 8)

On this appeal, plaintiff concedes that if the works of art were confiscated by the Soviet Government within its territorial boundaries, then the Act-of-State Doctrine would bar his claims (Plaintiff's Brief on Appeal, p. 5). However, plaintiff claims that defendants have failed to establish the absence of a genuine issue of fact as to where the art works were confiscated. In short, plaintiff seeks to resuscitate this lawsuit upon the shadowy theory that perhaps immediately before the sale the Soviet Government confiscated the art works in Berlin or somewhere else outside the Soviet Union. (Plaintiff's Brief pp. 5, 8, 13-14)

For reasons which are more fully analyzed below at Point IIB, defendant Weldon contends that there simply is no genuine

issue of fact which should have precluded the award of summary judgment in his favor.

ARGUMENT

I. THE ACT OF STATE DOCTRINE BARS PLAINTIFF'S CLAIMS

Defendant Weldon adopts the argument of the other defendants with respect to the applicability of the Act-of-State Doctrine.* The absence of a genuine factual dispute such as would cast doubt on the Doctrine's controlling effect is clear in both cases. In both cases it is undisputed that the works of art were expropriated in Russia by the Soviet Government in the early 1920's. They were sold at auction in Berlin in 1931 "by order of the Handelsvertretung or Trade Consulate of the U.S.S.R." (Memorandum Opinion, p. 3). The Soviet Government was recognized by the United States in 1933. These facts, as the Court below correctly determined, mandate application of the

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* Plaintiff makes some reference in his brief (at pp. 3 and 5) to the fact that only defendants Wrightsman actually pleaded Act-of-State as a defense. Plaintiff does not claim, however, that summary judgment as to Weldon is for that reason inappropriate. In view of the general purpose of Rule 56 to pierce the pleadings (and the liberal amendment policy of Rule 15), and assuming arguendo that Act-of-State is a defense which must be affirmatively pleaded, the better practice would "permit a defendant to move for summary judgment on the basis of a defense not pleaded in his answer." 6 Moore, Federal Practice ¶ 56.10 (2d ed. 1974). See also Id. ¶ 56.11[3]; Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943). Plaintiff does not claim to be surprised by the invocation of Act-of-State and has never previously argued that defendant should amend.

Act-of-State Doctrine. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Plaintiff now argues, apparently, that the record does not support the conclusion on summary judgment that the property was expropriated in Russia before the Berlin auction. This argument is without basis, as we will show below.*

II. PLAINTIFF HAS FAILED TO RAISE ANY GENUINE ISSUE OF MATERIAL FACT TO BAR SUMMARY JUDGMENT

Plaintiff does not dispute the Court's view of substantive law. He argues merely that that law was applied to facts still in dispute. But he defines that "dispute" entirely in terms of the insufficiency of defendants' evidence -- not in terms of conflicting evidence as to material facts. Indeed, plaintiff cites no affirmative evidence to support his claim that the art works were not expropriated in Russia by the Soviet Government. Rather, he claims that defendants' evidence is weak, irrelevant, or inadmissible to prove the opposite.

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* Point II, infra. We note here that plaintiff has now abandoned a point he conceded on the Weldon motion for summary judgment but attempted to revive on the Wrightsman motion: namely, whether the Handelsvertretung which ordered the Berlin sale was an agency of the Soviet Government. Plaintiff now admits that the question is irrelevant (Plaintiff's Brief, p. 8). The point, as Judge Bonsal saw, is that, "[w]hile the actual sale of the works of art occurred in Berlin, the property had been seized in Russia by the Soviet Government." (Memorandum Opinion, p. 8). This taking, not the subsequent disposal of the property, is the pertinent "act of state" for purposes of applying the doctrine.

In so doing, plaintiff misconceives not only the nature of the burden borne by the movant on motion for summary judgment, but also the strength of the showing tendered by defendants to discharge that burden.

A. Summary Judgment is Appropriate Where No Genuine Issue Concerning A Material Fact Remains To Be Tried

Federal Rules of Civil Procedure, Rule 56, provides in pertinent part:

> ...The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...
>
> * * *
>
> ...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Fed.R.Civ.P. 56(c), (e).

Professor Moore explains:

> The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such an issue is raised by the

> formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to defeat in whole or in part the recovery of a just claim or the expeditious termination of an action because of a meritorious defense that is factually indisputable. 6 Moore, Federal Practice ¶ 56.04[1].

Until Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964) was decided, there was perhaps some doubt as to whether this Circuit would allow the Rule so broad a sweep. Fearing "trial by affidavit," the courts had often found triable issues of fact upon the most meager of records. See, e.g., Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949). But in Dressler, Judge (now Chief Judge) Kaufman stated:

> ...the recent [1963] amendments to Rule 56 were designed to overcome just such cases, which, in the words of the [Advisory] Committee, have "impaired the utility of the summary judgment device." "The very mission of the summary judgment procedure," the Committee explained, "is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial..." 331 F.2d at 132.

Thus, as Chief Judge Friendly stated in Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972):

> The rule of Arnstein v. Porter [citation omitted] that summary judgment may not be rendered when there is the "slightest doubt" as

> to the facts no longer is good law. When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts. [Citations omitted].

It remains true that summary judgment is not to be a trial by affidavits. But the affidavits, depositions, interrogatories, admissions and pleadings, taken together, are to be sifted in determining whether there should be a trial at all.

> [T]he inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, 369 U.S. 654, 655 (1962) (per curiam).

For this reason, the function of the trial count on a motion for summary judgment has often been compared with that performed on a motion for a directed verdict. Sartor v. Arkansas Natural Gas Co., 321 U.S. 620, 624 (1944); American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, 388 F.2d 272, 279 (2d Cir. 1967), cert. denied 404 U.S. 1063 (1972). Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962); 6 Moore, supra, ¶¶ 56.02[10], 56.04[2].

It is now settled in this Circuit that the courts are "to approach the Rule with less reticence and more resoluteness." American Mfrs. Mutual Ins. Co., supra, 388 F.2d at 278. No longer must the movant remove the "slightest doubt." He must merely do as the Rule directs, i.e., "show that there is no genuine issue as to any material fact." See, most recently, United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976); Jaroslawicz v. Seedman, 528 F.2d 727 (2d Cir. 1975); Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975); Heyman v. Commerce and Industry Ins. Co., 524 F.2d 1317 (2d Cir. 1975). When that is done, the adversary "must adduce factual material which raises a substantial question" (Beal v. Lindsay, supra [emphasis added]) as to material facts or as to the veracity of the movant's presentation. In short, an adversary

> ... who has no countervailing evidence and who cannot show that any will be available at the trial [is not] entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial. 6 Moore, supra, ¶ 56.15[3]

It is not enough to advance suspicion or surmise in an attempt to create what are merely feigned or frivolous issues. First National Bank v. Cities Service Co., 391 U.S. 253(1968); Applegate v. Top Associates, Inc., 425 F.2d 92 (2d Cir. 1970); De Luca v. Atlantic Refining Co., 176 F.2d 421 (2d Cir. 1949), cert. denied 338 U.S. 943 (1950); Beidler & Bookmyer v. Universal Ins. Co., 134 F.2d 828 (2d Cir. 1943); Altman v. Curtiss-Wright Corp., 124 F.2d 177 (2d Cir. 1941); Banco de Espana v. Federal Reserve Bank, 28 F.Supp. 958 (S.D.N.Y. 1939), aff'd, 114 F.2d 438 (2d Cir. 1940).

For it remains

> [t]he very object of a motion for summary judgment...to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.
> Richard v. Credit Suisse, 242 N.Y. 346 (1926) (Cardozo, J.).

B. The Court Below Correctly Determined That No Genuine Issue of Material Fact Was Presented

The central issue before this Court is whether the award of summary judgment by the Court below is properly founded upon the absence of a genuine issue of material fact as to whether the painting was confiscated in Soviet territory prior to its sale in Berlin in 1931. An analysis of the uncontroverted facts before the Court below, the admissions and concessions of plaintiff bearing on this issue, and the failure by the plaintiff to assert any contrary facts to establish a genuine factual issue on this point clearly justifies the Court's ruling.

1. The Uncontroverted Facts

(a) The Painting Was in Russia at the Time of the Revolution

Defendant Weldon has always contended that the painting was never a part of the Stroganoff collection but since the time of Catherine the Great was instead a part of the State collection at the Imperial Hermitage Museum in St. Petersburg, Russia, (Defendant's Rule 9(g) Statement ¶¶ 5, 7). Plaintiff on the other hand claims that the painting was part of his family's collection and testified in his deposition in the Wrightsman case that he knew where the collection was "...until I left Russia in 1919. In our house, in the

Stroganoff house in Petrograd." (Stroganoff Deposition, p. 4, quoted in Plaintiff's brief on Appeal, p. 15.) Thus, whichever factual contentions are accepted, the location of the painting in Russia until at least the time of the revolution is not disputed.

(b) Pursuant to Numerous Decrees, the Soviet Government Confiscated Privately Owned Works of Art During the 1920's.

Defendants adduced substantial uncontroverted evidence showing the Soviet Government's pattern of confiscation during this period. Plaintiff contributed to this evidence.

Plaintiff's evidence consisted of a lengthy quotation from a Soviet decree of November 19, 1920. (Plaintiff's Affidavit in Opposition, pp. 5-6.) The decree called for the confiscation of the property, including "antiques and objects of art," of citizens who had fled the country. Plaintiff argued that, since his ancestor had voluntarily left Russia years before, the taking was not justified under the terms of the decree. But, of course, it is the very occurrence of the taking, implicit in plaintiff's argument, that triggers the Act-of-State Doctrine's prohibition against inquiry into the justification.

Defendant's evidence, referred to by the Court below (Memorandum Opinion, p. 6), revealed two further decrees: Decree No. 111 of the Council of People's Commissars, published on March 5, 1921, and Decree No. 245 of the All Russian Central

Executive Committee and the Council of People's Commissars, dated March 8, 1923. (See Exhibits A and G to the Wrightsman Motion for Summary Judgment.) No. 111 nationalized all movable property of citizens who had fled the Soviet Union, while No. 245 nationalized property housed in State Museums.

Both of these decrees were cited to the Court in Princess Paley Olga v. Weisz, [1929] 1 K.B. 718, a case presenting almost identical facts to those at bar. The Court below discussed that authority at length (Memorandum Opinion at 7) and cited it (Memorandum Opinion, p. 8) in support of its holding.

(c) The Painting Was Sold at Auction in Berlin in 1931 by the Soviet Union.

The Court below found that the painting was sold at the 1931 auction

> ... by order of the Handelsvertretung or Trade Consulate of the U.S.S.R. (Memorandum Opinion, p. 3.)

The nature of the Handelsvertretung as a Soviet agency was amply supported by defendants Wrightsman in support of their motion for summary judgment below. And, although plaintiff originally disputed the translation of the word, he apparently has abandoned that dispute on this appeal (Plaintiff's Brief on Appeal, p. 8).

From the above facts the following emerges. If the painting was in Russia at the time of the revolution, and shortly after the revolution the Soviet Government ordered the confiscation of privately owned works of art, and the painting was sold at auction in 1931 by a Soviet agency, then in the absence of contrary facts, the conclusion is inescapable that the painting must have been seized (if indeed it was ever owned by plaintiff's family) in the Soviet Union prior to its being transported to the Berlin auction.

2. Plaintiff's Admissions and Factual Concessions

Plaintiff's deposition testimony in the Wrightsman case concerning the location of the Stroganoff collection in 1919 has been treated above. No doubt counsel for defendants Wrightsman will discuss this and other admissions by plaintiff in their brief on this appeal. However, it should here be emphasized again that defendant Weldon first presented the Act-of-State Doctrine issue to the Court below in his motion for summary judgment filed in February, 1975, argued in May, and finally submitted on supplementary briefs on October 15, 1975. At no time during the litigation of this motion did plaintiff suggest in any way that there could be any issue whatsoever as to the fact that the painting was originally seized by the

Soviet Government in Soviet territory. On the contrary, this point was conceded on repeated occasions.

In his supplementary memorandum filed on or about October 15, 1975, plaintiff's position conceded the confiscation of the painting in the Soviet Union. Counsel's theory at that time was entirely different. He contended that the Act-of-State Doctrine should not be a bar to this action solely because the ultimate sale, but not the original seizure, took place in Berlin, outside the Soviet Union. Thus, counsel submitted that the Doctrine was inapplicable:

> ...because of the missing vital element: performance within that government's boundaries. The causa causans terminating in defendant's conversion in New York, was the sale in Berlin. (Plaintiff's Supplementary Memorandum, p. 4.)

Nowhere did plaintiff suggest or intimate the existence of an issue of fact with respect to whether the painting was originally confiscated in the Soviet Union. Instead, plaintiff's counsel merely indicated his willingness to assume "arguendo":

> ...that it was the U.S.S.R. that had sent the painting to Berlin, and authorized the auctioneer to sell it. (Plaintiff's Supplementary Memorandum, p. 3.)
>
> and
>
> ...that the U.S.S.R. was the 1931 consignor of the Berlin sale. (P. 4.)

Plaintiff himself specifically referred in his original

affidavit dated May 2, 1975 to "the consignor, the U.S.S.R." (Plaintiff's Affidavit, p. 3.) He went on to incorporate a quotation of a letter his mother wrote to protest the 1931 auction (as reported in a magazine, Art News, dated May 23, 1931):

> The Soviet republic has taken possession of this collection in a way that sets at defiance every principle of international law. (Emphasis supplied.)
> (Plaintiff's Affidavit, p. 5.)

Plaintiff then went on to explain the basis of his mother's claims by interpreting the Soviet decree of November 19, 1920, which nationalized "antiques and objects of art," contending that by its terms it applied only to the property of "citizens who have fled beyond the frontiers of the republic or who are in hiding." Plaintiff claimed that his ancestors had not fled but were living openly in Paris at the time of the revolution (Plaintiff's Affidavit, pp. 5-6). The obviously conceded point in such an assertion is that the disputed work of art was in fact confiscated by the Soviet government in Russia pursuant to the decree. Again, no suggestion was made that the location of the confiscation would constitute an issue of fact.

In plaintiff's counter-statement submitted in compliance with Local Rule 9(g), there is no doubt as to the location of the confiscation. Plaintiff specifically asserted:

> ...that the confiscation took place in Berlin on or about May 12-13, 1931 [the date of the auction].

This is apparently a restatement of his general theory that the taking was not complete until the completed act of sale, an argument which he has not presented on this appeal.

Counsel for plaintiff has himself made several additional significant concessions. In his supplemental affidavit of May 7, 1975, in opposition to the Weldon summary judgment motion, counsel asserts that the U.S.S.R. was the "consignor" of the painting at the Berlin auction (Stansky Supplemental Affidavit, p. 3). In his memorandum of law in opposition to the Weldon summary judgment motion, he refers to the "Berlin auction sale of the Stroganoff collection by the U.S.S.R."(Emphasis supplied.) (Memorandum, p. 2.) and argues that the Act-of-State Doctrine should not apply solely because "the U.S.S.R. sold plaintiff's property" in Germany and not the U.S.S.R. (Memorandum, p. 4).

3. Plaintiff's Failure to Set Forth Specific Facts Showing That There is a Genuine Issue For Trial

Contrary to his express obligations under F.R.C.P. Rule 56(e), at none of the several stages of opposition to defendants' motions for summary judgment has plaintiff "... set forth specific facts showing that there is a genuine issue for trial." On the contrary, although the variety of plaintiff's alternative theories

in opposition to the motions seems to be unending, the form of his opposition -- the bare assertion of hypotheses contrary to the facts asserted by the moving parties -- has remained constant. Thus, when defendant Weldon originally asserted that the painting had never in fact belonged to plaintiff's family but had instead been part of the Russian state collection at the Hermitage since the early 1800's, plaintiff hypothesized that perhaps part of the Stroganoff collection had been on extensive loan to State museums at the time of the revolution (Plaintiff's Affidavit, p. 3). When defendants Wrightsman asserted that the Soviet "Handelsvertretung" (as the selling agency was referred to in the German-language Berlin Auction Catalogue) was a governmental trade consulate, plaintiff's Counsel hypothesized that perhaps it was merely a private trade mission and not a governmental agency (Stansky Sur-Reply Affidavit, pp. 2-4), a position which plaintiff now apparently abandons.

True to form, now that he is before this Court, plaintiff now hypothesizes, contrary to his earlier repeated admissions and factual concessions, that perhaps the art works were never confiscated in Soviet territory at all but were seized from unknown private hands somewhere outside the Soviet Union immediately prior to the auction.

These examples of plaintiff's frantic efforts to show that his coveted "day in court" may prove more enlightening than his months in litigation could be multiplied ad nauseam But the arithmetic will not yield a genuine issue of material fact.

If such an hypothesis as plaintiff now tenders were supported by any facts contrary to the uncontroverted facts and the inferences which reasonably flow therefrom, then perhaps summary judgment would not have been appropriate. But no such contrary facts were submitted to the court below, and indeed none exist. The net result is that plaintiff is left resting "... upon the mere allegations or denials of his pleading," a position which fails to satisfy his affirmative duty of opposing the motions for summary judgment.

Long ago Chief Judge Learned Hand addressed himself to the kind of objections raised by the plaintiff at bar:

> The original may have been forged; the authentication may be false.... But if a motion for summary judgment is to have any office whatever, it is to put an end to such frivolous possibilities when they are the only answer. De Luca v. Atlantic Refining Co., 176 F.2d 421, 423 (2d Cir. 1949), cert. denied, 338 U.S. 943 (1950)

More recently, (then Circuit) Judge Kaufman pointed out the similar inadequacies in the showing made by a plaintiff opposing summary judgment. In Applegate v. Top Associates, Inc.,

425 F.2d 92 (2d Cir. 1970), plaintiff complained that defendants had abducted and confined his wife and children. Defendants answered with "convincing and apparently reliable" evidence, including the wife's testimony that she left plaintiff voluntarily and had obtained a divorce from him. Plaintiff's only response was to challenge the authenticity of the signature on his wife's affidavit and to hypothesize that the divorce had been obtained by an impersonator. The Court admitted "to having been fascinated and intrigued" by plaintiff's presentation, and then stated:

> To avoid summary judgment, however, a plaintiff must do more than whet the curiosity of the court; he must support vague accusation and surmise with concrete particulars.
>
> 425 F.2d at 96.

So here, the factual basis of plaintiff's claim that the Triest portrait was not confiscated in Russia by the Soviet Government remains a mystery; the "concrete particulars" are simply lacking.

III. SUMMARY JUDGMENT IS MANIFESTLY APPROPRIATE ON THE ADDITIONAL GROUND OF THE STATUTE OF LIMITATIONS

Since the issue was raised and fully briefed (See Defendant's Supp. Memorandum, pp. 9-14; Plaintiff's Supp. Memorandum, pp. 5-7) below, and since the rule is that:

> [o]n appeal from the grant or denial of summary judgment, the appellate court will affirm if the judgment or order is correct, although the reasons given by the trial court are erroneous [6 Moore, Federal Practice ¶ 56.27[1] (2d ed. 1974) (footnotes omitted)],

defendant Weldon maintains that an appropriate alternative ground on which to affirm the judgment below is provided by the statute of limitations.

Judge Bonsal did not find it necessary to reach the statute of limitations issue in deciding defendants' summary judgment motion. In a concluding footnote, however, (Memorandum Opinion at 9-i, n. 5), he did set forth some strong thoughts on the matter:

> Plaintiff has brought these suits for conversion of works of art. Under the applicable New York statute, New York Civil Practice Law and Rules ("CPLR") § 214(3) (McKinney 1972), "an action to recover a chattel or damages for the taking or detaining of a chattel ... must be commenced within three years." (Section 214(3) of the CPLR, effective September 1, 1963, replaced former Section 43(4) of the Civil Practice Act which provided a six-year statute of limitations.)
>
> Moreover, under New York CPLR § 206(a), a demand is necessary before a person is entitled to bring an action in conversion. That statute provides, in part:
>
> "... where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete."
>
> Here, it would appear that the right of

> plaintiff's mother to make the demand was complete in 1931 when the works of art were sold at the Lepke Auction in Berlin. Under the New York statute of limitations, it would appear that the time for commencing an action in conversion had already run at the time of Princess Stroganoff-Scherbatoff's death in 1944.

Plaintiff had argued in his supplementary memorandum of law in opposition (at 5-6) that the case of Menzel v. List, 49 M.2d 300, modified, 28 A.D.2d 516(1966) controls this issue, that by that authority the statute in this type of action commences to run from the date of demand and refusal, which in this case was late 1973, and that therefore the statute of limitations is not available to this defendant.

As can be seen from a review of the authorities, the statute of limitations commences to run not from the date demand is actually made, but from the time the right to make the demand becomes available. To the extent that the Courts in the various opinions in Menzel v. List, supra, have failed to take this into consideration, they have misconstrued the very language of the limitations provisions of the Civil Practice Law and Rules of the State of New York. See, e.g., Federal Insurance Co. v. Fries, 78 M.2d 805, 355 N.Y.S.2d 741 (N.Y. Civ.Ct. 1974) (Irving Younger, J.); City of New York v. New York City Transit Authority, 53 M.2d 627, 279 N.Y.S.2d 278 (S.Ct.N.Y.Co. 1967); Jacques v. White Knob Copper & Devel. Co. Ltd., 260 App.Div. 640, 23 N.Y.S.2d 326 (1st Dept. 1940); Weinstein, Korn & Miller, New York Civil Practice ¶ 206.02-.03.

Federal Insurance Co. v. Fries, supra, is especially apposite. That case involved a claim for the return of some rings which had mistakenly been given to defendant by a bank in 1967. The mistake was discovered in 1969, and a demand for return of the rings was made. The demand was refused, and the action was commenced in 1971. The Court held, consistent with Gillet v. Roberts, 57 N.Y. 28 (1874), and Menzel v. List, supra, that the cause of action against a bona fide holder of allegedly converted property is not complete until demand and refusal and that the three year limitation period applies [CPLR 214(3)]. However, it granted defendant's motion to dismiss because the statute commenced to run not from the time of demand but the time when the plaintiff became "... entitled to make the demand," that is, the time when the rings were mistakenly given to the defendant.

> Were the rule otherwise, a plaintiff might extend the statute indefinitely, merely by postponing the making of a demand. 355 N.Y.S. 2d at 747.

Furthermore, even though the bank did not learn of the mistake until 1969, the Court held that "... ignorance does not stop the clock" (355 N.Y.S.2d at 747), citing General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 127, 272 N.Y.S.2d 337, 338 (1966), unless fraudulent conduct is involved.

Applying these principles to the facts of this case, it is clear that this action is time barred. Although it was

in fact commenced well within three years of the 1973 date of demand for return of the painting, the opportunity to make that demand arose at least as early as 1963, the date that defendant acquired the painting (See Weldon Affidavit, ¶ 3). Moreover, there can be no claim of fraudulent concealment since the painting was catalogued for exhibition, as part of Mr. Weldon's collection, at the Rhode Island School of Design in 1964 (Weldon Affidavit, ¶ 9 and Exhibit 6 attached thereto).

Therefore, since this action has not been commenced within the statutory period, measured from the date of acquisition, the time in the language of CPLR § 206(a) "... when the right to make the demand is complete," this action should be dismissed as time barred.

Moreover, it should also be pointed out that unlike the fact situation in Menzel v. List, supra, the Stroganoff family, through Plaintiff's mother, has long ago protested the alleged wrongful holding of the painting and has in effect demanded its return. (See Plaintiff's Affidavit, p. 5) Apparently, no legal action was taken after the protested auction sale in 1931. Under these circumstances, it would be inequitable to tolerate an abuse of the demand concept by permitting a self-professed owner to sit back and make demands upon successive owners without litigating, counting instead upon each transfer of ownership to revive the cause of action through the demand

and refusal concept. Such a fact situation presents all the more reason why this action should be held to be time barred, as Judge Bonsal noted. Representatives of plaintiff made their demand in 1931. They should not be permitted to make successive ones as late as 1973 without suffering dismissal of their stale claims.

CONCLUSION

For the foregoing reasons, the Order granting summary judgment to defendants should be affirmed.

Dated: New York, New York
October 4, 1976

Respectfully submitted,

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OF COUNSEL:
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United States Court of Appeals
for the Second Circuit

George Stroganoff-Scherbatog,
Plaintiff-Appellant,

against

Henry H. Weldon,
Defendant-Appellee.
and two other actions

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Wesley Mc Daniel, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 2189 Pitkin Avenue, Brooklyn, New York
That on October 4, 1976, he served 2 copies of

on
Davis, Polk & Wardwell
1 Chase Manhattan Plaza
New York, New york 10005

Lord, Day & Lord
25 Broadway
New York, New York, 10004

Lyman Stansky
667 Madison Avenue
New York, New York 10021

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Wesley Mc Daniel

Sworn to before me this
4th day of October, 19 76

John V Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977